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## LEGAL CAUSE IN ACTIONS OF TORT.

[*Concluded.*]

IT remains to consider another argument in favor of the alleged rule of non-liability for improbable consequences, and one which has had great influence.

It is said<sup>1</sup> that, even if the rule, that probability is the legal test of the existence of causal relation, is open to serious objection, it is nevertheless the only practicable working test. The law must adopt *some* test; and this is asserted to be less objectionable than any other which has been, or can be, suggested.<sup>2</sup> And here it will be urged that our argument against the alleged rule is an instance of *petitio principii*. We have been assuming that the alleged rule, if applicable for any purpose, can be so only as an arbitrary rule restricting, or preventing, liability in cases where it has already been found that the causal relation does, as matter of fact, exist. But it will be said that this assumption begs the question. It will be contended that the alleged rule is to be applied as an absolute legal test in solving the primary inquiry whether the causal relation does or does not exist.<sup>3</sup> If a certain result would antecedently have been improbable, then it will be said that it must be conclusively

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<sup>1</sup> See "third" position, *ante*, 25 HARV. L. REV. 248.

<sup>2</sup> "... the only test left to resort to, a test which, though approved neither by logic nor justice, is yet better than none, better than to admit a limitless liability for all consequences of acts . . ." See Terry, *Leading Principles of Anglo-American Law*, § 410, where this language is used in reference to a somewhat different topic.

<sup>3</sup> See Watson, *Damages for Personal Injuries*, § 142.

deemed impossible; in other words, the law will never, no matter how strong the proof may be, hold that defendant's tort actually caused plaintiff's damage, if such a result antecedently was improbable.

So far as the question whether the plaintiff's damage was in reality caused by the defendant's tort is one of fact, it would seem that the tribunal passing upon it should not be influenced by considerations of policy or expediency. If the court is to give the jury a definition of "legal cause" to be applied in solving the question of fact, that definition should not arbitrarily give artificial weight to any one particular circumstance, such as probability or improbability. Probability should not be made an absolute legal test of the existence of causal relation.

But some advocates of the rule we are combating appear to think that the choice is between adopting their rule or having no rule at all. They say that the law ought to lay down some definition or test of causation. Then they, in effect, take the position that no other practicable rule than this can be laid down.<sup>4</sup> Hence they conclude that if their rule is rejected, defendants will be left at the mercy of juries. There must be an end somewhere to liability.<sup>5</sup> If you reject the rule of non-liability for improbable consequences, what definite rule will you substitute for it; what other stopping place is there; what practical check upon the caprice of jurors?<sup>6</sup>

Here it should be said that some jurists are so much impressed with the danger of submitting to a jury any question connected with causation, that they are inclined to make the method of deciding questions of causation an exception to the methods generally prevailing as to other topics. They think that even questions of fact arising under any definition of causation must be decided solely by the judge and never submitted to the jury. They would say that "although a question of fact, it is one for the court to

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<sup>4</sup> ". . . it is absolutely the only rule of which the subject in its nature is susceptible, . . ." Watson, *Damages for Personal Injuries*, § 145.

<sup>5</sup> See Salmond, *Jurisprudence*, ed. 1902, 478; Terry, *Leading Principles of Anglo-American Law*, § 528.

<sup>6</sup> Mr. Sedgwick, in controverting the position that the degree of fault should govern the amount of remuneration, adverts to the danger that the courts "in despair of reducing the subject to principle," "will throw the responsibility of the matter on the jury, leaving everything to their vague, fluctuating, and all but uncontrolled discretion." 1 Sedgwick, *Damages*, 6 ed., 129.

determine.”<sup>7</sup> Thus in *Hobbs v. L. & S. W. Ry. Co.*,<sup>8</sup> Blackburn, J., said:

“I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not.”

This view simply amounts to establishing an arbitrary exception, grounded on distrust of jurors. We can see no sufficient reason for such a departure from legal analogies. If the methods of decision now prevailing as to other topics are followed here, then no definition of legal cause, no test of “remoteness,” can be given which will not result in submitting most close questions of causation to a jury. The very test we have been specially discussing, the test of probability or improbability, will present a question for the jury in all doubtful cases. Any legal definition of causation must raise the question whether all the requirements of the definition are found to be present in the particular case. No sound principle can be laid down by which the judge can always determine this question without infringing on the province of the jury.

*Engelhart v. Farrant and Co.*<sup>9</sup> was an action for negligence. The County Court Judge, who tried the case without a jury, found for plaintiff. The Court of Appeal said, in substance: It is a question of fact whether certain negligence was “an effective cause” of the damage. If there were any real doubt as to this and the trial had been before a jury, this question must have been left to the jury. The Court of Appeal has power to draw obvious inferences of fact, and to exercise in this case the functions of a jury. The Court of Appeal finds no error in the decision of the County Court Judge upon this question of fact; and refuses to reverse the judgment.

Suppose, for the sake of argument, that there are only two alternatives: One, to adopt the test of probability; the other, to regard the question of the existence of causal relation as a pure question of fact; to be submitted by the judge to the jury without any explanation as to the meaning or requisites of the term “legal

<sup>7</sup> See Clerk & Lindsell, *Torts*, 5 ed., 146, as to “remoteness.” And *cf.* Ladd, J., in *Gilman v. Noyes*, 57 N. H. 627, 633-635 (1876); 1 Sutherland, *Damages*, 3 ed., § 16.

<sup>8</sup> L. R. 10 Q. B. 111, 122 (1875).

<sup>9</sup> [1897] 1 Q. B. 240.

cause," without giving them any chart or compass to go by. Does the adoption of the latter view confer upon the jury absolute and unrestrained power over the pocket of the defendant? Anyone who gives an affirmative answer to this inquiry overestimates the power of the jury and ignores the functions of the judge. Indeed the legal doctrines as to this matter are so elementary that the following statement of them may seem unnecessary.

Even though it be assumed that the question of the existence of causal relation is one of fact for the jury, yet this proposition "is necessarily subject to the limitation affecting the submission of all questions of fact to the jury: that if on the evidence reasonable men can come to only one conclusion, there is no question for their [the jury's] decision."<sup>10</sup> The law does not place in the hands of the jurors power to decide that the causal relation may be inferred from any state of facts whatever.<sup>11</sup>

Before the question of causation can be submitted to the jury, there is a preliminary question to be decided by the judge; namely whether upon the evidence twelve honest men can reasonably find the existence of the causal relation. It is for the judge to say whether the jury *can* reasonably so find; and then, if he decides in the affirmative, it will be for the jury to say whether they *do* so find. The judge has to say whether on the evidence causal relation *may be* reasonably inferred; the jurors have to say whether from the evidence, if submitted to them, the causal relation *is* inferred by them.<sup>12</sup> The question of causation will not get to the jury at all, unless the judge thinks that twelve men can reasonably find that the defendant's tort was, at the moment of the happening of the damage, a (continuing efficient) cause of the damage and not a mere antecedent fact. This power of the judge, properly exercised, materially lessens the danger of an unjust result as to causation. And it is especially important in cases where the commission of the tort is remote in space or time from the happening of the damage.<sup>13</sup>

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<sup>10</sup> Parsons, J., in *McGill v. Maine & New Hampshire Granite Co.*, 70 N. H. 125, 129, 46 Atl. 684, 686 (1899).

<sup>11</sup> Cf. Lord Cairns, in *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193, 197 (1877). See Watson, *Damages for Personal Injuries*, §§ 170, 175.

<sup>12</sup> Salmond, *Torts*, 2 ed., 110-111, 29; Terry, *Leading Principles of Anglo-American Law*, § 72.

<sup>13</sup> See Bishop, *Non-Contract Law*, §§ 44, 41; Mr. Labatt in 33 Can. L. J. 718, 721.

If the judge thinks that there is no reasonable evidence to justify a finding of causal relation, he will not submit the case to the jury.<sup>14</sup> Conversely, if the judge thinks that the jury cannot reasonably fail to find the existence of causal relation, he can direct a verdict for the plaintiff, so far as this question of causation is concerned.

But while the above methods of procedure have the effect of narrowing the functions of the jury, yet it may be said that the result is simply to substitute uncertain and varying decisions of judges for similar decisions of jurors; and that in both cases it is equally impossible to foretell either the result or the grounds upon which the result will be reached.

Experience furnishes at least a partial answer to this objection.

The decisions of judges as to whether to submit cases to juries, even though the judge is to be regarded as thus passing upon a question of fact, nevertheless in time constitute a set of precedents, having great and frequently decisive weight in later cases. Whether this effect is produced rightly or wrongly, there can be no doubt that it is produced.<sup>15</sup> The body of precedent that will thus be formed on the subject of causation may not be so large, nor carry so much weight, as the body of precedent that has already been formed on the question of the existence of negligence. But there certainly will be precedents as to causation, and the establishment of such precedents must always have a tendency "to narrow the field of uncertainty."<sup>16</sup> There can be no precedents for the verdicts of juries.<sup>17</sup> But there may be precedents upon the duty of judges to submit cases to juries.<sup>18</sup>

<sup>14</sup> See Terry, *Leading Principles of Anglo-American Law*, § 550.

<sup>15</sup> Sir William Markby in 2 *L. Mag. & Rev.*, 4th Series, 318, 322-324, 330-331; Holmes, *Common Law*, 120-129; Professor E. R. Thayer in 5 *HARV. L. REV.* 190-193; Terry, *Leading Principles of Anglo-American Law*, §§ 75, 195, 559.

<sup>16</sup> See Holmes, *Common Law*, 127.

<sup>17</sup> "A second incidental advantage of trial by jury is connected with this: it decides cases without establishing precedents." Sir J. F. Stephen, *General View of the Criminal Law of England*, 1 ed., 208.

<sup>18</sup> Some decisions sustaining a demurrer to a declaration, and thus refusing to submit the question of causative relation to a jury, are very unsatisfactory. The judge sometimes seems to consider the case as if the question were, whether the judge, if himself a juror, would find for the plaintiff upon proof of the facts stated in the declaration. But the real question is, whether, upon any state of facts provable under the declaration, a jury would be at liberty to find for plaintiff. Sustaining the demurrer is, in effect, a decision that the declaration discloses no ground upon which a jury could reasonably find that causal relation existed.

Thus far we have been proceeding upon the supposition that, if the test of antecedent probability is rejected, it is impossible to frame any other legal test of causation; and that the question must be regarded as purely one of fact. And we have attempted to show that even this view does not give the jury wholly unrestrained power.

But is it true that no legal test can be framed to take the place of existing tests, all of which are unsatisfactory? Is it impossible for the judge, if he rejects the hitherto prevailing tests, to instruct the jury in such a way as to assist them in arriving at a right solution of the problem of causation? It has been said by reputable jurists that no definite principle can be laid down by which to determine the question of causation, or, to use the popular language, to determine whether damage in a given case is "proximate or remote." Some statements as to this are quoted in the note below.<sup>19</sup>

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<sup>19</sup> "It is unfortunate that no definite principle can be laid down by which to determine this question. It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." 1 Street, *Foundations of Legal Liability*, 110.

"Not only is the line of demarcation between proximate and remote damage undefined and undefinable — it is really a flexible line" (here bringing out the fact that the law will declare damage to be proximate in some descriptions of torts which in other connections would be considered to be remote). "One is baffled in the attempt to define and delimit the conception of proximate cause as worked out in particular torts, no less than in the entire field of tort." *Ibid.* 111.

"This subject is involved in obscurity greater perhaps than hangs about any other head of the law, and it is exceedingly difficult, if not quite impossible, to extract from the authorities any clear and definite general principles. . . . After much reflection I have not succeeded in coming to any view that seems to me free from difficulties. I shall not therefore in this place attempt to deduce from the authorities a systematic and complete statement of the existing law, but rather to analyze the various conceptions used, show wherein some generally accredited rules are open to exception, and present certain suggestions as to what the true underlying principles are." Terry, *Leading Principles of Anglo-American Law*, § 545.

In saying that the consequences "must not be too remote," the courts are "laying down a condition . . . which cannot possibly be reduced to rule. . . ." "It is a question of *degree*, dependent upon the circumstances of each particular case; . . ." E. C. Clark, *Analysis of Criminal Liability*, 17.

" . . . no general rule can be laid down by reference to which the question, whether in any particular case the damage sought to be recovered is too remote, can be determined. Whether it is, or is not, too remote is a question of fact depending on all the circumstances of the case. . . ." (The learned authors add: "but although a question of fact it is one for the Court to determine.") Clerk & Lindsell, *Torts*, 5 ed., 146.

Any universal precepts which might be formulated "would be indefinite and un-

If the learned writers just quoted in the note mean only that no minutely specific rule can be laid down whereby all questions of causation can be instantly solved, they are undoubtedly correct. But it does not follow that it is impossible to lay down a general rule, which, although confessedly imperfect, is nevertheless better than any of the tests hitherto in common use.<sup>20</sup>

Probably no definition, or test, of legal cause can be given which will not be open to some objections. But it is desirable that *some* definition should be given, and the question is which definition is least objectionable. In framing a definition on any legal topic there is always danger of going to one of two opposite extremes. One is, making a statement in such vague and general terms as to be practically useless. The other is, attempting by a series of minute tests to lay down special rules whereby it will be practicable to decide instantly each case that may arise; an attempt not likely to succeed.

By way of rough approximation<sup>21</sup> to a correct general rule, we suggest the following statement, which is in the nature of a fragment of a code on torts framed after the manner of the Indian Penal Code; *i. e.* giving first a general rule in broad terms, and then accompanying it with explanations (or subsidiary rules) and also with concrete illustrations.

*Problem.* — What constitutes such a relation of cause and effect (such a causal relation) between defendant's tort and plaintiff's damage as is sufficient to maintain an action of tort?

*General Rule.* — Defendant's tort must have been a substantial factor in producing the damage complained of.

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satisfactory guides." Professor Bingham in 9 Col. L. Rev. 145; and see p. 144, note 23.

As to vagueness of general rules proposed, see 36 Am. St. Rep., note, pp. 811-812.

<sup>20</sup> Why should one attempt to define legal cause, if he does not himself believe his statements to be absolutely correct?

Answer: An attempt at definition, even if the statement is torn into shreds by critics, may have the effect of stimulating discussion upon this topic, which has hitherto received less attention at the hands of legal writers than almost any other subject of equal importance. Professor Maitland, we believe, has somewhere said, in substance, — that the putting forth of a "sharply wrong" rule may be serviceable by provoking inquiry which ultimately results in the bringing forth of a "sharply right" rule.

<sup>21</sup> See Willard, Law of Personal Rights, 254.

Or, — To constitute such causal relation between defendant's tort and plaintiff's damage as will suffice to maintain an action of tort, the defendant's tort must have been a substantial factor in producing the damage complained of.<sup>22</sup>

<sup>22</sup> In regard to the words — "must have been a substantial factor in producing the damage complained of":

As to the ideas intended to be conveyed by "substantial," "factor," and "producing," various other expressions have been thought of, some of which are given below. If some of these substitutes are adopted, it might be desirable to change "have been" to "have had," or "have constituted," or "have contributed," or "have aided in."

Possible substitutes for "substantial": — Considerable. Important. Large. Material. Efficient. Continuously Efficient.

Possible substitutes for "factor": — Part (must have had a substantial part). Share. Element. Influence. Effect. Contribution. Ingredient.

Possible substitutes for "have been a substantial factor": — Materially contributed to. Substantially aided in.

Possible substitutes for "producing": — Subjecting plaintiff to. Exposing plaintiff to. Bringing about. Bringing to pass. (See *post*, Explanation 5, and Illustrations 5 and 7*b*.)

Possible substitute for the phrase "must have been a substantial factor in producing the damage complained of": — Must have been "an active and efficient factor in bringing about the result." See 1 Sedgwick, *Damages*, 9 ed., § 118. And compare § 112: "this cause must be active enough in the result for it to be regarded in the law as efficient in responsibility."

When the general rule is to be applied (as it often will be) by juries, it might, perhaps, be desirable to substitute "considerable" for "substantial"; and to substitute "part" for "factor." If an issue is submitted to a panel of jurymen in language which they all understand, they are very likely to arrive at a correct solution. But it is a not uncommon mistake in charging juries to use words the meaning of which may not be readily apprehended by some members of the panel. The great majority of jurors would fully understand the meaning of the word "factor" when used in the above connection; but this might not always be true of every member of the panel.

"Substantial" is not here meant to be understood as expressing merely the idea of "actual," as opposed to "nominal." It is meant to be understood as expressing the idea of "considerable" or "of some magnitude," in antithesis to "trifling," "slight," "trivial" or "minute." This notion of "considerable" is the idea sometimes (though it may not be always) conveyed by the word "substantial" in the statement, that, in order to maintain an action for certain kinds of "nuisance," the damage must be "substantial." See *Rushmer v. Polsue*, [1906] 1 Ch. 234, Warrington, J., p. 237, *Cozens-Hardy*, L. J., pp. 250, 251; Lord Selborne in *Gaunt v. Fynney*, L. R. 8 Ch. 8, 12 (1872); *Salmond, Torts*, 1 ed., 184-187.

The objection of vagueness, in the terms used in the general rule, will be discussed later. But, as to the possibility of defining the exact magnitude of the influence which must be exerted by defendant's tort, it may here be suggested that writers on criminal law are confronted by a similar difficulty in defining the magnitude of the act required to constitute the crime of "attempt" and that the highest authority has said: "How great it must be, . . . is matter not reducible to exact rule." 1 Bishop, *New Criminal Law*, § 759, paragraph 1.

There are two phrases, one or the other of which would have been used by many

## EXPLANATIONS OR SUBSIDIARY RULES.

*Explanation 1.* "A substantial factor." Not the only causative antecedent, nor the predominant causative antecedent, nor the sum of all the causative antecedents. Not the sole factor, nor the predominant factor. Enough if it is a substantial part of the causative antecedents; if it is one of several substantial factors. See *post*, Illustration 1.

*Explanation 2.* "A substantial factor," "in producing the damage," etc. These words should be understood as involving the idea of "continuous efficiency." This means that the *effect* of defendant's tort must have appreciably continued; either down to the very moment of damage; or, at least, down to the setting in motion of the final active injurious force which immediately produced (or preceded) the damage. In this sense, defendant's tort must continue to be "a practically active cause."<sup>23</sup> But this does not mean that any *force* which was a direct and immediate consequence of defendant's tort, *i. e.* any force which began to operate immediately upon the commission of the defendant's tort, must have continued in active motion up to the moment of the damage. See, *post*, Illustrations 2 *a* and 2 *b*.<sup>24</sup>

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lawyers in framing a general rule. One is, "an efficient cause." In defining "legal cause," we thought it desirable to avoid using the word "cause" itself. The other is, "materially contributed" to the result. See replication in *Byrne v. Wilson*, 15 Ir. C. L. 332 (1862). The ambiguity of the word "contributed" has occasioned much difficulty in the discussion of "contributory negligence." It may mean, contributed as a part of the legal cause. Or it may mean, contributed as a remote and non-causative antecedent. See the opinion of Lord Penzance in *Radley v. London*, etc. Ry. Co., 1 App. Cas. 754, 759 (1876), where the word is used in one sentence in one meaning, and in the next sentence in an entirely different meaning.

We may as well notice here the possible objection, that the phraseology of the General Rule would literally apply only to affirmative tortious conduct, and would not include cases of negligence. It is true that, in actions for negligence, the conduct of the defendant immediately preceding the happening of the damage may be alleged to consist in omitting to prevent the accident. But, in almost all cases of actionable negligence, the defendant has, prior to the time of the alleged omission, done certain affirmative acts which imposed upon him the duty of care. Negligence, upon a broad view of the whole case, generally involves careless doing rather than mere not doing. See Professor Wigmore in 8 HARV. L. REV. 386, note 2; Pollock, Torts, 6 ed., 417-418; O'Neal v. Grizzle, 124 Ga. 735, 53 S. E. 244 (1906).

<sup>23</sup> See 1 Sedgwick, Damages, 9 ed., § 115 *a*.

<sup>24</sup> Some logicians draw a sharp distinction between (1) causative motion which induces an immediate change in the position of a material object and (2) the subsequent continuance of that object in the position where such motion has placed it. If B. overthrows a material object by the motion of his arm, it is admitted that B. acts as a cause in producing the change of position. But it is said that, by the change which has thus taken place, "the causation is exhausted, even though the effect, the state brought about by the change, persists"; . . . "only the effect persists, not the causation." See 2 Sigwart, Logic, Dendy's Transl., 95. But whatever may be the correct view from the standpoint of logic, courts often hold B. liable where the continuance of the object in the position where his movement placed it is a substantial factor in sub-

*Explanation 3.* A defendant's tort cannot be considered a legal cause of plaintiff's damage, if that damage would have occurred just the same even though the defendant's tort had not been committed. See *post*, Illustrations 3*a* and 3*b*. *Exception.* Where two tortfeasors are simultaneously operating independently of each other, and the separate tortious act of each is sufficient in and of itself to produce the damaging result.<sup>25</sup>

*Explanation 4.* The fact that the damage would not have happened "but for" the commission of defendant's tort, does not, as a matter of law, necessitate the conclusion that defendant's tort was a legal cause of the damage. This fact is generally one of the indispensable elements to establish the existence of causal relation. But it is not the only requisite; it is not *per se* an all sufficient element. See *post*, Illustration 4.

*Explanation 5.* It is not necessary that the defendant's tort should have set in motion the final active injurious force which immediately preceded the infliction of the damage. It is enough if defendant's tort was a substantial element in subjecting plaintiff to suffer damage from the operation of that final force.<sup>26</sup> See *post*, Illustration 5. And compare Illustrations 7*a* and 7*b*, *post*.

*Explanation 6.* The fact that the final active injurious force consists of, or is set in motion by, the tortious act of a third person, who is not acting in concert with defendant, does not necessarily prevent defendant's tort from being regarded as a legal cause of the damage. See *post*, Illustration 6.

*Explanation 7.* The fact that the specific consequence complained of was unforeseen and unintended by defendant, and was improbable, does not necessarily prevent defendant's tort from being regarded as a legal cause of that consequence. See *post*, Illustrations 7*a* and 7*b*.

#### ILLUSTRATIONS.

*Illustration 1.* By a collision between two teams in a highway, plaintiff who was walking carefully across the street, suffered damage. The collision (and the consequent harm to plaintiff) was due to the simultaneous negligence of both drivers, and would not have occurred if only one had been negligent. The negligence of each driver was equal to that of the other in quality and in effect. In a suit by plaintiff against one of the drivers, the negligent act of the defendant is regarded as a legal cause of the harm to plaintiff.<sup>27</sup>

*Illustration 2a.* By defendant's negligent management of a trolley car, jecting a plaintiff to damage. See *post*, Illustration 2*a*. Mr. Labatt says: ". . . if the abnormal conditions created by the defendant's act are found to have continued up to the time when the injury was received, and to be, in a physical sense, constituent factors of the total sum of incidents which make up the injury, the defendant should in justice be required to make good the damage done." 33 Can. L. J. 721.

<sup>25</sup> As to this exception, see *ante*, 25 HARV. L. REV. 109, n. 20; also Watson, Damages for Personal Injuries, §§ 60-64, and § 43; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69 (1902).

<sup>26</sup> Hence the expression "subjecting plaintiff to the damage" seems preferable to the ordinary phrase "producing the damage."

<sup>27</sup> See *Mathews v. London Street Tramways Co.*, 60 L. T. Rep. n. s. 47 (1888) (a case differing in specific facts from the above illustration).

plaintiff, a passenger, is thrown flat upon the highway. Before he has time to rise, he is there negligently run over by a wagon. Defendant's negligent management of the trolley car is a legal cause of the harm done to the plaintiff by the wagon passing over him.<sup>28</sup>

*Illustration 2b.* Defendant negligently sells gunpowder to a very young boy, who is evidently incapable of safely using or taking care of it. When the boy reaches home his father takes the powder from him and locks it up in a closet. Next day the father gives the powder to the boy, who throws it into the street and there sets it on fire, causing an explosion whereby plaintiff is hurt. Defendant's negligence in selling the powder to the boy is not a legal cause of the harm suffered by plaintiff.<sup>29</sup>

*Illustration 3a.* Defendant cut ice from a lake near a highway, and did not put up around the open space such fence-guards as were required by statute. Plaintiff's horses escaped from the control of their driver, ran rapidly into the opening, and were drowned. If the fright and speed of the horses were such that they would have run into the opening even if it had been properly guarded, then the failure of the defendant to erect proper guards is not a legal cause of the drowning of the horses.<sup>30</sup>

*Illustration 3b.* A. strikes B., who is at the time so ill that she could not possibly have lived more than six weeks if she had not been struck. In consequence of the blow, B. dies earlier than she would otherwise have died. A.'s blow is the legal cause of the death of B.<sup>31</sup>

*Illustration 4.* A belt in a machine shop was broken by the negligence of defendant, the owner of the shop. Plaintiff undertook to mend the belt, and while doing so met with an accident for which defendant was not to blame. Plaintiff would not have attempted to mend the belt and would not have been hurt, if the belt had not previously been broken. Defendant's fault, which occasioned the breaking of the belt, is not a legal cause of the harm suffered by plaintiff while mending the break.<sup>32</sup>

*Illustration 5.* Defendant navigates his ship so negligently that it strikes upon a shoal and becomes unmanageable and entirely beyond control. While in this condition, the ship is carried by the wind and tide against a sea wall of the plaintiff, damaging the wall. Defendant's fault in allowing the ship to become uncontrollable is a legal cause of the damage to the plaintiff's sea wall.<sup>33</sup>

*Illustration 6.* Defendant negligently left in the highway a truck loaded with iron, so placed on the truck that the iron would easily fall off. A third person wrongfully moved the truck, thereby unintentionally causing the iron to roll off and to hit the plaintiff. Damage of this kind might have been reasonably foreseen as a not unlikely consequence of leaving the truck in the highway. Defendant's fault in leaving the truck in the highway is a legal cause of the harm to the plaintiff.<sup>34</sup>

<sup>28</sup> Adapted from *Fine v. Interurban Street Ry. Co.*, 45 N. Y. Misc. 587, 91 N. Y. Supp. 43 (1904).

<sup>29</sup> Adapted from *Carter v. Towne*, 103 Mass. 507 (1870). Compare *Pittsburg, etc. Co. v. Horton*, 87 Ark. 576, 113 S. W. 647 (1908).

<sup>30</sup> *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629 (1893).

<sup>31</sup> Substance of *Illustration (5)*, Stephen, *Digest of Criminal Law*, 6 ed., 179, citing *R. v. Fletcher*, 1 Russ., Crimes, 4 ed., 703, 7 ed., 692 (1841). For a recent decision see *McCahill v. New York Transportation Co.*, 201 N. Y. 221, 94 N. E. 617 (1911). Compare 2 Bishop, *New Criminal Law*, § 638, paragraph 3.

<sup>32</sup> *Schultz v. Eckardt Mfg. Co.*, 112 La. 568, 36 So. 593 (1904). See Lord Dunedin in *Dunnigan v. Cavan & Lind Mfg. Co.*, 48 Scot. L. R. 459, 461 (1911).

<sup>33</sup> *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Exch. 204, (1870).

<sup>34</sup> *Lane v. Atlantic Works*, 111 Mass. 136 (1872).

*Illustration 7a.* Defendant, by fraudulent representation, induced plaintiff to refrain from selling shares in a certain corporation. While plaintiff was acting under this inducement in continuing to hold the stock, an officer of the corporation embezzled most of its funds, thereby greatly diminishing the value of the stock. Plaintiff thereafter sold his stock at a great reduction from its value at the date of the fraudulent representation. Neither plaintiff nor defendant foresaw, or had probable ground to foresee, this embezzlement. Defendant's fraudulent representation is a legal cause of the loss sustained by plaintiff.<sup>35</sup>

*Illustration 7b.* Plaintiff went to defendant's warehouse and demanded his goods which were there deposited. Defendant, by reason of his negligent failure to investigate, denied that the goods were there. Hence plaintiff went away without the goods. On the following night the goods in the warehouse were consumed by an accidental fire for which defendant was not to blame. Defendant's negligent failure to deliver the goods was a legal cause of the destruction of the goods.<sup>36</sup>

Assuming the "fragment of a code on torts" to have been enacted in the foregoing form, with the accompanying explanations and illustrations, what use should be made of it; how should it be applied upon the trial of a case?

The judge, in charging the jury, should always state the general rule as the principal rule of law relating to causation. As to the explanations, or subsidiary rules, he should state such, and only such, as may be applicable to the facts of the particular case. Probably no one case would call for the application of all seven of these explanations. Whenever the judge states any one of these explanations, he should make it clear that he is not substituting the explan-

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<sup>35</sup> *Fotler v. Moseley*, 185 Mass. 563, 70 N. E. 1040 (1904).

<sup>36</sup> *Railroad v. Kelly*, 91 Tenn. 699, 20 S. W. 312 (1892); *Stevens v. B. & M. R.*, 1 Gray (Mass.) 277 (1854). See this case stated in Appendix.

If it is desired that the rule or requisites of causal relation should be stated without the addition of any explanations or illustrations, the following formulæ are suggested:

There are two requisites:

1. (Generally) — That the damage would not have occurred just the same, if defendant's tort had not been committed.

2. Defendant's tort must have been a substantial and continuously effective factor in subjecting plaintiff to the damage.

Or, in other words:

1. Defendant's tort must be one of a series of antecedent events, without which the damage would not have happened.

2. It must not only be an antecedent, but also a causative antecedent; *i. e.* an antecedent having a substantial and continuously efficient share in producing the damage.

The two requisites might be stated more briefly by employing two Latin phrases:

1. Defendant's tort must be a *causa sine qua non*.

2. It must also be a *causa causans*.

But this does not tell us what are the essential elements to constitute a *causa causans*.

ation for the general rule, but is only trying to make it easier for the jury to understand the general rule and to apply it to the facts of the particular case. The explanations and illustrations are not intended to replace the general rule, but to illuminate it.<sup>37</sup>

As to the number of explanations or subsidiary rules: If seven, why not seventy or seven hundred? Why not state in detail the concrete point decided in every reported case which has arisen upon the subject of legal cause?

Because our present purpose is, not to make a digest of all the decisions, but to bring out the most important elementary principles underlying those decisions. The decisions contain the rough material from which the leading principles are to be evolved; but a detailed statement of each separate decision is not equivalent to a statement of the leading principles. It would not give the resultant force of all the decisions taken together.

It may be inexpedient to state general principles without adding any explanations or subsidiary rules. But it is not desirable to attempt to add subsidiary rules sufficiently numerous and sufficiently minute to point out unerringly the exact decision in every conceivable specific case. Even if sub-rules could be stated that would thus cover the whole ground definitely, "they would be very complicated, full of fine distinctions and hard to apply in practice."<sup>38</sup> Professor Terry correctly says that it "would be one of the most delicate problems of the whole work of codification" to decide "how far it would be wise to go in laying down subrules and specifications under general principles."<sup>39</sup>

If we have erred on this point in the present article, we think the error is on the side of fulness. Explanations 2, 5, and 6 are of less relative importance than Explanations 1, 3, 4, and 7. It might have been better to omit 2, 5, and 6. There is always the danger of over-definition. Sir J. F. Stephen<sup>40</sup> thinks it a mistake, in fram-

<sup>37</sup> See Chailley, *Administrative Problems of British India*, 361.

<sup>38</sup> See language used in reference to another topic in Terry, *Leading Principles of Anglo-American Law*, § 581.

<sup>39</sup> Terry, *Leading Principles of Anglo-American Law*, § 610. Compare Willard, *Law of Personal Right*, § 236. "Hugo's objection proceeds on the mistake of supposing that a Code must provide for every possible concrete case. But this (as I have shown already) is what no law (statute or written) can possibly accomplish. It would be endless." 2 Austin, *Jurisprudence*, 3 ed., 687.

<sup>40</sup> 3 Stephen, *History of Criminal Law*, 306.

ing a code, "to try to anticipate captious objections." He says:

"... over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling."

As to objections which may be urged against the general rule which we have suggested:<sup>41</sup>

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<sup>41</sup> Before considering objections to the tests just stated in the "fragment of a code on torts," it may be useful to see how far those tests differ from the views expressed in the important opinion of Wardlaw, J., in *Harrison v. Berkley*, 1 Strob. L. (S. C.) 525 (1847), one of the earliest and ablest of the opinions which reject the alleged rule of non-liability for improbable consequences.

Judge Wardlaw, in his *dicta* in that case, practically lays down two rules:

1. A wrongdoer is liable, at all events, for probable consequences.
2. He is also liable for such improbable consequences as are both proximate and natural.

The crucial sentence in Judge Wardlaw's definition of "proximate" is:

"Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequences, or may be traced in those causes." At p. 549.

Judge Wardlaw's definition of "natural" is:

"By this, I understand, not that they should be such as upon the calculation of chances would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from." At p. 549.

In condensed form: Events occurring without extraordinary departure from the usual course of nature, though not reasonably to have been anticipated. For another definition of "natural and proximate," see Trenchard, J., in *Smith v. Public Service Corporation*, 78 N. J. L. 478, 480, 75 Atl. 937, 938 (1910).

Both terms, "proximate" and "natural," are infelicitous. "Proximate" is often used as synonymous with "legal cause" (and might be understood as making nearness in time or space an essential element). "Natural" is frequently used in the sense of "probable." Neither term is used by Judge Wardlaw in these common significations.

We differ from Judge Wardlaw in two respects:

1. We do not think that a defendant should always be exonerated where there was an extraordinary and unforeseeable departure from the usual course of nature. As to this point the opinion of the court in the representative case of *Green-Wheeler Shoe Co. v. Chicago, R. I. & Pac. R. Co.*, 130 Ia. 123, 106 N. W. 498 (1906), seems preferable to the opinion in *Rodgers v. Missouri Pac. Ry. Co.*, 75 Kan. 222, 88 Pac. 885 (1907). See, *post*, discussion in Appendix.

2. We do not think it essential that the defendant's act should predominate over other causes. (See, however, in support of Judge Wardlaw, *Biggs, J.*, in *Pierce v. Michel*,

It will perhaps be admitted by some that our general rule is well enough as far as it goes; but it will be contended that it ought to go farther and give more minute and specific tests. Probably it will be chiefly objected to on the ground of vagueness. But the question of causative relation is in reality one of fact and degree; and all attempts hitherto made at laying down universal tests of a more definite and more specific nature have resulted in propounding rules which are demonstrably erroneous.

"Four or five rules have been proposed, discussed, and found inadequate; all of them, in difficult cases, fail even to guide a jury, and no one has prevailed over the others."<sup>42</sup>

"Several rules of liability have been prescribed, only to be shattered by novel accidents, thus demonstrating that the mind is unable to conjecture all the harmful results which may flow from a delinquent act and flow from it in such natural sequence that, on a presented case, it can be pronounced the wrongdoer was to blame."<sup>43</sup>

It is not believed that any minute and elaborate tests would "bear the strain of individual cases in the course of experience." The only way to prevent such tests from sometimes operating unjustly would be by giving an unnatural and forced construction to their language, or by creating arbitrary exceptions and qualifications.

Is not this the difficulty with some definitions of legal cause (some statements of the requisites to the existence of causal relation), namely: That the framers of the definitions are aiming at "the ideal of a logical and methodical exactness" greater than the subject permits of?<sup>44</sup>

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60 Mo. App. 187, 191 (1895); 1 Sutherland, *Damages*, 3 ed., § 16.) The defendant's tort need not have "contributed" to the damage more largely than any other cause. It is enough if it substantially "contributed"; if it constituted one of the substantial factors in subjecting plaintiff to the damage.

Suppose that damage results from the simultaneous concurrent acts of two independent wrongdoers; the tort of each having the same causative force as that of the other; *i. e.* each constituting one half of the compound cause. If the "predominant" test is insisted upon, how could either be held liable? Would not both escape?

Moreover, would it not often be difficult to determine the question of predominance? "What among many essential causes can be said to predominate or be exclusively efficient?" See 9 Col. L. Rev. 144, note 23.

<sup>42</sup> Professor Beale in 9 HARV. L. REV. 80.

<sup>43</sup> Goode, J., in *Lawrence v. Heidbreder Ice Co.*, 119 Mo. App. 316, 330, 93 S. W. 897, 900 (1906).

<sup>44</sup> If exact definition is here found unattainable, this will not be the only legal topic

Attempts have been made to discover (what has been assumed to exist) a form of words termed a test of causal relation, "which, put into the hands of jurors, can be used by them as a sort of legal yardstick to measure the evidence" and to determine, instantly and with mathematical exactness, whether or not the defendant's tort caused the plaintiff's damage. But a test possessing these qualities (a test with such potentiality) has never been found; "not because those who have searched for it have not been able and diligent, but because it does not exist."<sup>45</sup>

It is often difficult to determine whether the defendant's tort was the cause of the plaintiff's damage; but this difficulty arises "from the nature of the facts to be investigated." It is a practical difficulty "to be solved by the jury," and not a legal difficulty for the court.<sup>46</sup>

in such a predicament. As to the subject of "attempt" in criminal law, high authorities declare it impossible to give an exact definition or generalization in regard to the so-called "proximateness" of an act.

Sir J. F. Stephen in 2 *History of Criminal Law of England*, 224, says: "The law as to what amounts to an attempt is of necessity vague. It has been said in various forms that the act must be closely connected with the actual commission of the offense, but no distinct line upon the subject has been or as I should suppose can be drawn." The same author, in his *Digest of Criminal Law*, 1 Am. ed., Art. 49, after defining attempt as "an act done with intent," etc., "and forming part of a series of acts which," etc., says: "The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case."

So Dr. Bishop in 1 *New Criminal Law*, § 759, paragraph 1, says: "An attempt may be too small a thing, or proceed not near enough to its accomplishment, for the law to notice. How great it must be, and how far progress, is matter not reducible to exact rule." See also 1 Bishop, *New Criminal Law*, § 762, paragraph 4; and compare Holmes, J., in *Commonwealth v. Kennedy*, 170 Mass. 18, 22, 48 N. E. 770, 771 (1897).

And Dr. Kenny in *Outlines of Criminal Law*, Webb's Am. ed., 73, says: "It seems impossible to lay down any abstract test for determining whether an act is sufficiently proximate to be an 'attempt.'"

For another instance of admitted vagueness, see Professor Maitland's comment on his own definition of "trust." He said: "It is a wide vague definition, but the best that I can make." Maitland, *Lectures on Equity*, 44.

Sir J. F. Stephen said of a certain statutory definition: "I do not think it happy, as it attempts to define what is essentially indefinite." 3 Stephen, *History of Criminal Law*, 316.

<sup>45</sup> This phraseology is largely borrowed from Dr. Bishop's discussion as to "Test of Insanity," 1 Bishop, *New Criminal Law*, § 381.

<sup>46</sup> See dissenting opinion of Doe, J., upon another topic, in *State v. Pike*, 49 N. H. 399, 438 (1870). See also *New York, etc. R. v. Estill*, 147 U. S. 591, 613, 13 Sup. Ct. 444, 453 (1892). The difficulty lies "in ascertaining the facts, and not in applying law to them." 3 Stephen, *History of Criminal Law*, 6.

"The question whether an item of loss is or is not a proximate consequence of the wrong is in each case a question of fact. Only general principles can be laid down, and in applying them much latitude must necessarily be left to the court and jury. If the case is a clear one, the court will direct the jury upon the question; but if the question is a doubtful one it will be left to the jury." (After giving instances where certain consequences were held proximate and others remote.) "An entirely harmonious course of decision on such a question is not expected. As the determination is really one of fact, under proper directions, and ordinarily for the jury, the decision may simply be the result of the court's upholding the right of the jury to decide one way or the other; and even if the court itself determine the question, as is not infrequent in practice, it is nevertheless natural to expect differences of opinion upon what are really close questions of fact."<sup>47</sup>

It may be urged in favor of laying down minute legal tests of causation that, in the absence of such tests, a defendant cannot foretell in advance the extent of the liability he is incurring. But what principle of justice requires the law to furnish him such information?<sup>48</sup> As to the standard of conduct, *e. g.* as to what conduct shall be deemed negligent, there is more room for the argument that a defendant ought to know what actions the law forbids, and thus be able to keep within legal bounds. But here, *ex hypothesi*, the defendant has been guilty of wrongful conduct; he has exceeded the legal limit, and the only remaining question is as to the extent of his liability, *i. e.* as to the existence of causal relation between the defendant's fault and the plaintiff's damage.<sup>49</sup>

Suppose that, in establishing a general rule upon this subject of causation in actions of tort, we are confined to a choice between two tests: First, the rule of liability for probable consequences only; second, the "General Rule" we have suggested ("defendant's

<sup>47</sup> 1 Sedgwick, Damages, 9 ed., §§ 116, 117.

<sup>48</sup> See *ante*, 25 HARV. L. REV. 248-249; reply to argument founded on hardship.

<sup>49</sup> *France v. Gaudet*, L. R. 6 Q. B. 199 (1871), was an action for conversion. At the time of the conversion, a special value was attached by special circumstances to the goods converted. Although these special circumstances were not known to the defendant, he was nevertheless held liable for the full actual value fixed by these circumstances. Mellor, J., said, on page 205, ". . . no notice to the wrongdoer could then affect the value, although it might affect his conduct; but upon what principle is a notice necessary to a man who *ex hypothesi* is a wrongdoer?"

tort must have been a substantial factor in subjecting plaintiff to the damage complained of").

If either of these tests is adopted as an exclusive general rule to be applied in all cases, it is likely that practical injustice will occasionally result. Under the first test recovery may sometimes be unjustly denied. Under the second test, recovery may sometimes be unjustly permitted. If injustice will appreciably result more frequently under one of these tests than under the other, then the test under which this happens should be discarded. Neither logic, nor legal symmetry, furnish conclusive reasons for adopting a rule of law. The decisive consideration is that furnished by experience — the practical working of a rule.<sup>50</sup>

Our own impression is that practical injustice would result more frequently from the operation of the first test than from the second. Hence we should reject the first test; and, if we are compelled to choose one of the two, we should adopt the second test.

Suppose, however, that there is no difference between the two tests as to practical injustice. Suppose that the number of unjust results from the application of one test will be exactly equal to the number under the other test. Under the one test, there will be the risk that a recovery may occasionally be unjustly denied to the plaintiff. Under the other test, there will be the risk that, in an equal number of instances, a recovery may be unjustly allowed against the defendant. Whichever test then is adopted, one party or the other has got to run a risk of occasional injustice. Upon which of the two parties ought this risk to be imposed: Upon the innocent plaintiff or the tortious defendant? In the words of Judge Christiancy in *Allison v. Chandler*:<sup>51</sup>

"... does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party?" "The nature of the case is such as the wrongdoer has chosen to make it; and, upon every principle of justice, *he* is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the

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<sup>50</sup> "But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice." Allen, J., in *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 288, 47 N. E. 88, 89 (1897). "The life of the law has not been logic: it has been experience." Holmes, *The Common Law*, 1. See 11 HARV. L. REV. 439; 14 HARV. L. REV. 195.

<sup>51</sup> 11 Mich. 542, 553-556 (1863).

nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume — not simply to divide this risk, which would be thus far unjust — but to relieve the wrongdoer from it entirely, and throw the *whole* upon the innocent and injured party?"<sup>52</sup>

*Jeremiah Smith.*

CAMBRIDGE, MASS.

## APPENDIX.

There are two classes of cases which have occasioned great difficulty. It has sometimes been supposed that, if it is laid down as a general rule that the improbability of a result does not *per se* exonerate a wrongdoer, then these cases must constitute exceptions to such a rule. In the foregoing general discussion very little consideration has been given to these classes. It is proposed now to deal with them more fully.

These classes of cases are:

1. Where, although defendant was in fault, yet no damage would have resulted but for an occurrence in the natural world, which constituted an extraordinary departure from the usual course of nature.

2. Where defendant's conduct was wrongful, but no harm would have resulted had it not been for the unforeseeable intervention of an independent wrongdoer.

As to 1, there is a remarkable conflict of authority. Some courts would order a verdict for the defendant, and others for the plaintiff.

As to 2, the weight of authority is in favor of exonerating the defendant; but it may be found upon examination that some cases of this description present a question for the jury.

As to the first class, the arguments *pro* and *con* are brought out, and authorities are collected, in the conflicting decisions in two recent cases; namely, *Green-Wheeler*

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<sup>52</sup> The frequent references to Professor Terry's book, *Leading Principles of Anglo-American Law*, and to Professor Bohlen's articles in legal periodicals, hardly represent the full extent of the present writer's obligations to these learned authors; neither of whom, of course, can be held responsible for the ultimate conclusions here reached.

Professor Terry's book, published in 1884, though cited by such jurists as Sir Frederick Pollock and Professor Wigmore, is not often referred to in the reports either by counsel or judges. The work contains a good deal of valuable matter not to be found elsewhere. The learned author never evades a difficulty. He seldom fails to state the crucial issues upon each topic discussed; though he sometimes frankly confesses his inability to arrive at a satisfactory solution. A reader can derive great benefit from this book, even if he does not agree with all the author's theories or adopt all his phraseology.

Professor Bohlen's essays on various legal subjects, in the *American Law Register*, the *University of Pennsylvania Law Review*, and the *HARVARD LAW REVIEW*, are of great value. He lets in light upon every subject which he discusses. It is hoped that a volume may soon be published containing a full collection of all Professor Bohlen's articles in legal periodicals.

Shoe Co. v. Chicago, R. I. & Pac. R. Co., 130 Ia. 123, 106 N. W. 498 (1906), and Rodgers v. Missouri Pac. Ry. Co., 75 Kan. 222, 88 Pac. 885 (1907).

Precise question presented by the Green-Wheeler case: A common carrier negligently delays goods *in transitu*. While he is so delaying and the goods are still in his custody, the goods are destroyed by a flood, which was greater than ever before known and could not have been reasonably anticipated (in legal phraseology, "an act of God"). If the goods had been promptly carried to their destination, they would have escaped the flood. Is the carrier liable for the value of the goods?

The Rodgers case differs from the Green-Wheeler case as to one matter of fact. In the Rodgers case the goods were no longer in transit when overtaken by the flood. They were at the railroad terminus, but had not been delivered to the consignee. But for the original delay in starting the goods on their transit, the goods would have reached the terminus so early that they would have been delivered to the consignee before the flood, and would thus have escaped destruction.

On the above general question there is a remarkable conflict of authority. We are inclined to agree with the Iowa result, and to dissent from the Kansas result.

The carrier is a wrongdoer, the only wrongdoer in the chain of antecedents. And, but for his wrong, the damage would not have happened. Both these circumstances combined do not, as *matter of law*, make out that his tort was the legal cause, or one of the concurring causes. But these two circumstances are competent to be considered *on the question of fact*, and go far to justify a finding of causal relation. It would seem that a jury might reasonably find that the effect of defendant's negligence appreciably continued down to the time of destruction, and that it constituted a substantial factor in subjecting plaintiff to the loss. It may be urged that "the carrier's delay did not produce the flood"; but this is true of the usual operations of nature, where a defendant is liable if his tort concurred therewith in bringing about damage. The workings of nature constitute the surroundings for all human acts; no man is excused simply because he did not create natural events, such as the blowing of the wind, or the flowing of the tide, in the Romney Marsh case, L. R. 5 Exch. 204 (1870); or the coldness of the atmosphere in Harrison v. Berkley, 1 Strob. L. (S. C.) 525 (1847); or in Fox v. B. & M. R. Co., 148 Mass. 220, 19 N. E. 222 (1889). See 1 Beven, Negligence, 3 ed., 80.

In the case now under consideration, while the defendant's negligent delay did not cause the flood, yet it did in fact subject plaintiff's property to the operation of the flood.

"This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation." McClain, C. J., in Green-Wheeler Shoe Company v. Chicago, R. I. & Pac. R. Co., 130 Ia. 123, 129, 106 N. W. 498, 500 (1906).

The right of a railroad company to transport explosives in its freight cars "does not include the right to subject persons along the route to dangers from explosions for a longer time . . . than is reasonably necessary to the performance of the carrier's duty." . . . "If, therefore, the car was unnecessarily and unreasonably delayed at the place where it exploded, so as to subject plaintiff's property to such dangers for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place was a nuisance." Williams, J., in Fort Worth, etc. Ry. Co. v. Beauchamp, 95 Tex. 496, 500, 68 S. W. 502, 504 (1902). The danger

that property may be destroyed by occurrences which would constitute an extraordinary departure from the usual course of nature is sometimes regarded as such an appreciable risk that it is insured against.

Somebody has got to bear the loss in this case. Should it be the innocent plaintiff, or the negligent defendant whose fault is potentially operative down to the time of loss?

That defendant could not have anticipated such a flood would be decisive in his favor, if plaintiff were relying on defendant's failure to take special precautions against the flood, as proof of his negligence. But here defendant's negligence is established on other grounds; namely, his delay; and the question is not whether his failure to anticipate the flood constitutes negligence, but whether his liability for the actual consequences of his admitted negligence should be restricted to such of those consequences as were foreseeable by him.

Suppose a carrier puts a covering over goods, sufficient to protect them from any rain that could reasonably be anticipated; and that, while he is carrying the goods with reasonable promptness, an entirely unprecedented rain occurs whereby the goods are ruined. The defendant is not liable for failing to provide a better covering. There is no tort on his part, no fault of his anywhere in the chain of antecedents. Hence, there is no question of causation. But how would it be, if the defendant was guilty of negligent delay in the carrying, and if such negligent delay exposed the goods to this extraordinary rain, which they would otherwise have escaped? Here the defendant is clearly in fault. The only question is one of causal relation. Is he to be exonerated from liability for the consequence of an admitted fault, because that consequence was not foreseeable by him?

Is there any limit to the enforcement of claims of this class? Can a consignee recover against a negligently delaying carrier for damage happening to goods a year after their delivery, upon the allegation that, but for the detention, the goods would have been sold and would not have been exposed to a cyclone twelve months later? Probably not. In general, a jury could not reasonably find that the effect of the delay appreciably continued so long and that the delay was a substantial factor in subjecting plaintiff to the loss. In cases not so extreme, the evidence may sometimes justify the submission of the question of fact to a jury; but no mathematical line can be drawn. The nearer the happening of the damage comes to the time of the defendant's delay, the more apt will the jury be to find a causative relation under our test. They are still more likely to find causative relation when the loss occurs during the delay and while the goods are still in the defendant's custody; but we do not regard either of these elements as legally essential to liability. (See, however, 1 Sedgwick, Damages, 9 ed., §§ 119*a* to 119*e*.)

Compare two decisions of the Massachusetts court: *Denny v. New York Central R. Co.*, 13 Gray 481 (1859); and *Stevens v. B. & M. R. Co.*, 1 Gray 277 (1854).

The *Denny* case is somewhat like the *Rodgers* case; and the defendant was held not liable.

In the *Stevens* case, the goods had arrived at the place of destination, and were in the railroad freight depot. The consignee sent a teamster to remove the goods. The railroad freight agent negligently believed that the goods were not there, and negligently told the teamster so. Hence the teamster went away without the goods. The goods, remaining in the freight depot, were destroyed by an accidental fire during the following night. Under the law of Massachusetts, a fire occurring without fault of the railroad would not *per se* make the railroad liable. *Norway Plains Co. v. B. & M. R. Co.*, 1 Gray (Mass.) 260 (1854). *Held*, that the railroad was liable for the value of the goods. Shaw, C. J., said, at pp. 281-282 "... we think that, as the negligence

of the agent of the corporation in this case prevented the plaintiffs from getting their goods into their own possession on Monday afternoon, by means whereof they remained in the depot and were burnt, the loss was so directly the consequence of this default on the part of the corporation that the value of the goods . . . is the just rule of damages."

The Stevens case has come up (substantially) in several jurisdictions, and the weight of authority is with the decision in 1 Gray 277. See *Railroad v. Kelly*, 91 Tenn. 699, 20 S. W. 312 (1892), and *Central Trust Co. v. East Tennessee, etc. Ry. Co.*, 70 Fed. 764 (1895).

How can we reconcile the Stevens case with the Denny case or the Rodgers case?

The negligent misstatement (and the leaving the goods in the depot) had no tendency to cause the fire, but merely exposed the goods to the fire should it occur. There seems to have been no reason for anticipating that the fire would occur. Again, the defendant's conduct in both cases was simply negligent, not wilfully wrong. The delay in transportation in the Rodgers case was in one sense passive conduct, and the mistaken statement in the Stevens case was in one sense affirmative conduct; but the gist of the tort in each case is negligence.

It might be said that the existence of causal relation is a question of fact, and a question of degree, not determinable by definite rules; that in the Stevens case the defendant's fault is nearer in point of time to the happening of the damage; and that the defendant's fault is more obviously a substantial factor (potentially operative) in the damaging result. But if the results in these cases cannot be reconciled, we think it does not follow that the Stevens case is wrong. We prefer the other alternative, that the Rodgers case is wrong.

In 18 Yale L. J. 340-342, Mr. Larremore, if we understand him rightly, concedes that, under the established legal doctrine ("under existing abstract rules") as to causation, a decision like that in the Rodgers case is logically sound. But he believes the result to be practically unjust; and hence thinks the court should establish, for such cases, "a direct exception" to the established "theory of proximate and remote causes." If Mr. Larremore would follow Mr. Beven and Professor Bohlen, he would find a better way. The Rodgers case and its fellows all proceed upon the idea that there is an arbitrary rule of law, that a tortfeasor is not liable for improbable consequences. Mr. Beven and Professor Bohlen deny the existence of such a rule; and we think that they are right.

The foregoing reasoning would tend to establish the liability of a carrier, who was not "a common carrier." If the defendant is "a common carrier," the argument against him is still stronger. Such a defendant, in setting up the plea that the damage was due to the act of God, is claiming the benefit of an exception to the stringent general rule as to a common carrier's liability. But the benefit of this exception should be allowed only to those common carriers who are personally free from fault. It ought not to be allowed where the carrier's tortious delay exposed plaintiff's property to destruction by an extraordinary departure from the usual course of nature. See *Brown, J., in Bibb Broom Corn Co. v. Atchison, etc. R. Co.*, 94 Minn. 269, 275-276, 102 N. W. 709, 710-711 (1905).

As to the second class of cases, which it has sometimes been supposed must constitute an exception to a general rule that the improbability of a result does not *per se* exonerate a wrongdoer:

Class 2. Where defendant's conduct was wrongful, but no harm would have resulted had it not been for the unforeseeable intervention of an independent wrongdoer.

We have seen (*ante*, 25 HARV. L. REV. 118-119 *et seq.*) that there was formerly a tendency to hold that an earlier wrongdoer was never liable, though the intervention of the later wrongdoer was foreseeable. While this view prevailed, it would have been hopeless to contend that the earlier wrongdoer could ever be liable in case of non-foreseeable intervention. But now that this former view is generally abandoned, the question as to the possible liability of an earlier wrongdoer in case of non-foreseeable intervention is entitled to judicial consideration.

Suppose that, under our suggested rule of causation, the earlier tort is found as a fact to be in part the cause of the commission of the later tort, and thus in part the cause of the damage to the plaintiff which followed immediately upon the commission of the later tort. But suppose also that these consequences were not foreseeable (as probable) at the time of committing the earlier tort. Would the earlier tortfeasor be exonerated on that ground alone? We think not. The vital question is, whether the earlier, as well as the later, acts are "traceable by their substantial effects to the ultimate result which constitutes the injury." It may be that "such an entirely new form has been imparted by the later act to the abnormal conditions created by the earlier act, that it would be unjust to hold the author of the earlier act responsible for the final injury. But if no such metamorphosis has taken place, and if the injury is physically an actual result of a coöperation between the abnormal conditions created by both acts, either of the authors of those acts must, upon any rational principles, be regarded as responsible for a part of the injury" (though in measuring the amount of recovery "the law will not usually undertake to apportion the share of each, but will hold each liable for the whole"), "and it is idle to ask whether the later act was one which might have been anticipated. . . . The law should concern itself, not with the time at which an act is done, but with the question whether the act is still potentially operative for harm at the time the injury itself was inflicted." See Mr. Labatt, 33 Can. L. J. 720, 721. And these principles should govern (apply) even though the commission of the later tort was not induced directly or indirectly by defendant's earlier tort.

It has been said: ". . . if two distinct causes are successive and unrelated in their operation they cannot be concurring. One of them must then be the proximate, and the other the remote, cause." Williams, J., in *Kerr v. City of Lebanon*, 149 Pa. St. 222, 226-227, 24 Atl. 207, 208 (1892).

If "proximate" cause is here used in the sense of "legal" cause, the statement is erroneous, as implying that contiguity in space or nearness in time are legal tests of the existence of causal relation and that the antecedent which is nearest in space or time is invariably to be regarded as the sole legal cause. See *ante*, 25 HARV. L. REV. 107-108, comments on Bacon's Maxim.

Moreover, there are cases where "the original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result." Henshaw, J., in *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 505, 111 Pac. 534, 537 (1910), citing as one instance *Pastene v. Adams*, 49 Cal. 87 (1874).

If two causes are operating together and each is a substantial factor in producing the damage, "it is not necessary that the beginning of their operation should be simultaneous." See Bishop, *Non-Contract Law*, § 450. "So long as the act of the defendant still concurs with the new human act it remains a proximate cause of any further loss." 1 Sedgwick, *Damages*, 9 ed., § 126.

It has been said: ". . . directly the natural course of events is . . . accelerated . . . by any other impelling agency, that agency becomes the *causa proxima* and the

natural consequences of the original impelling agency are held to cease," unless the original wrongdoer ought to have known of the new cause and ought to have foreseen the probable result. Pigott, Torts, 166. But Professor Bohlen rightly says that the intervening agency, in order to be regarded in law as breaking the causal connection between the original wrong and the damage, "must divert, and not merely hasten, the natural effect of the wrong, . . ."; 40 Am. L. Reg. N. S. 163, citing *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490, 27 Atl. 545 (1893). And see *Coleman, J.*, in *Thompson v. L. & N. R. Co.*, 91 Ala. 496, 499-500, 8 So. 406, 407-408 (1890).

A part of the following passage from the opinion of Miller, J., in *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 44, 52 (1868), has often been quoted in reference to this subject:

"One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause."

These *dicta* related to the construction of a clause in a contract of insurance, not to causal relation in actions of tort. "Some obscurity . . . has arisen from the attempt to draw analogies from insurance cases for application to cases that are governed by quite different principles." Terry, *Leading Principles of Anglo-American Law*, § 549. In actions on contracts of insurance there has been a tendency to hold that, for certain purposes as between the insured and the insurer, the cause nearest to and immediately preceding the loss is alone to be regarded. See *Knowlton, C. J.*, in *Lynn Gas & Electric Co. v. Meriden Ins. Co.*, 158 Mass. 570, 576, 33 N. E. 690, 691 (1893). But "consequences may be proximate in actions for tort which would not be so if the question were of an underwriter's liability to pay for losses." Terry, *Leading Principles of Anglo-American Law*, § 549. Thus a shipmaster's negligence "may be a proximate cause of the loss in an action against him" (by his employer) "for neglect of duty and a remote cause in an action against the underwriter on the policy." Terry, *Leading Principles of Anglo-American Law*, § 543. "In an action on a policy the *causa proxima* is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of torts the *causa causans* is by no means disregarded." Lord Lindley, in *Fenton v. Thorley & Co.*, [1903] A. C. 443, 454.

The phrase "of itself sufficient to stand as the cause of the misfortune" is ambiguous. See Terry, *Leading Principles of Anglo-American Law*, §§ 549, 558. It may mean — a new force which would have come into operation just the same and which would have produced the same final damage at just the same time, even though the defendant's earlier tortious conduct had never taken place. If the premise is construed in this way, the conclusion is not likely to be disputed. But the phrase may mean — a new force, sufficient when, and only when, added to, or operating in connection with, the effect already existing as a result of defendant's tort. If this is the correct interpretation, then we submit that the proposition is not universally true. There are cases where the earlier tortious act may have such continuous efficacy (may continue to be so potentially operative) that it must be regarded as a substantial factor in subjecting plaintiff to the damage. "We have been cited to no authority in a suit for the recovery of damages, where it was shown that, if the 'result' was the necessary and inevitable effect of a first cause, and a new independent force intervened sufficient of itself to produce the effect, and only hastened the result, the first cause was held to be too remote. In such cases both causes necessarily contribute to the result." *Coleman, J.*, in *Thompson v. L. & N. R. Co.*, 91 Ala. 496, 500, 8 So. 406, 408 (1890). Because the later or intervening tortfeasor can be held liable, it does not necessarily follow that the earlier tortfeasor is exonerated. The contrary view seems

to have been taken by Strong, J., in *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 475 (1876), in the following passage:

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause." But this is in effect the same fallacy involved in the view of the trial judge in *Vicars v. Wilcocks*, 8 East 1 (1806), namely, that the fact that the plaintiff has a remedy against the "later" wrongdoer constitutes *per se* a sufficient reason for denying him a remedy against the "earlier" wrongdoer. Mr. Bower's answer to that view has already been quoted in an earlier part of this article:

"Where it is a question whether A. has been injured by B., it is wholly immaterial whether he has or has not an additional or alternative remedy against C., and it can never lie in the mouth of a wrongdoer, if he is a wrongdoer, to set this up." Bower, *Code of the Law of Actionable Defamation*, 315. Compare *Watson, Damages for Personal Injuries*, § 74.

Of course, it is not contended that the earlier of two "successive" wrongdoers would *always* be liable. On the contrary, in a large proportion of cases it would be found as matter of fact, and rightly found, that the earlier tort was not potentially operative at the time of committing the later tort (or, at all events, not so at the time of the damage) and that the later wrongdoer was the sole substantial human factor in bringing about the damaging result.

"There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the damage was attributable in part to the concurrent or subsequent intervening misconduct of a third person. . . . But the general tendency has been to look no further back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act." Holmes, J., in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48, 49, 15 N. E. 84, 86, 87 (1888).

Moreover, if the only fault sought to be imputed to the earlier conduct was that of negligence, it might be held that there was no negligence if it was improbable that the earlier conduct would tend to induce the commission of a subsequent tort.

Even if the foregoing general views are deemed sound, it may still be contended that the *wilful* tort of a later wrongdoer, if not foreseeable as probable, will always and necessarily break causal connection, and thus prevent holding the earlier wrongdoer as a part of the cause of the damage. It cannot be denied that such an idea has been entertained. See Holmes, L. J., in *Sullivan v. Creed*, [1904] 2 I. R. 317, 356. But we are inclined to question its universal applicability to all conceivable situations. There are wide diversities of fact as to the nature of the tort of the earlier wrongdoer, and as to the extent of its continuing efficacy. Those diversities (as to continuing efficacy) are differences of degree, not reducible to rule. All that we contend for is, that the conduct of the earlier tortfeasor may, in some cases, be of such a nature and have such a continuing effect that a jury can find it to be a substantial factor in subjecting the plaintiff to the damage, *i. e.* find it to be a part of the cause, and not merely an antecedent fact whose effect ceased when the later wrongdoer began to commit a wilful tort. In *Fottler v. Mosely*, 185 Mass. 563, 70 N. E. 1040 (1904), the defendant, the earlier of two "independent" *wilful* tortfeasors, was held liable in an action of deceit, although he did not foresee the commission of the later tort; and although the earlier tort had no tendency to induce the commission of the later tort, but merely exposed the plaintiff to a risk of loss in case the second tort should be committed.